NO. 94-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

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CLERK

BARBARA NORTON; GLORIA MCLINTON; IDA LEE SMITH; CHARLES SOLOMON; LEWIS A. WARD JR.; GLENDA F. PATRICK; TERRY HUNTER; PAULETTE GADISON; MICAH SIMS; IDA NEAL; VIRGINIA SMALL; LEE ANDERSON; ROBERT ARORA; HERRMAN AUGUSTIN; RACHEL ANZALDUA; JAMES AUTRY; CHIKE J. OGBOENYIYA; CHARLES PACE; CHRISTINE VILLARREAL; NANETTE YELDER; LANG VAN BUI; VICTOR WHITE; KERMIT FISHER; ANDREW BEASLEY; ALFREDENE THOMAS; EDWARD FINISTER; ALICE HAYES; REGINALD JEFFERSON; PATSY LEE; DANDY HUNT; THOMAS WELLS, III; LONZO DORN; CORDELIA BELEHU; ALAN RICHARDSON; MARSHALL O'BRIEN; WAYNE HALLMAN; MARY MARTINEZ; SHELIA PHILLIPS; RENEE EDWARDS; LEO AARON, JR.; SYLVIA HERNANDEZ; ELIZABETH ARGUETA; SPENCER JACKSON; JIM BURNS, JR.; LEOLA CRAWFORD; WINSTON PINK; VICTOR SAMPLES; LINDA JOLIVET; LARRY WARD; GLORIA CASTILLO; ANTHONY GARCIA; SANTOS MARTINEZ; AND LINDA SCHWARTZ, Individually and on behalf of all others Similarly Situated,

Petitioners,

v.

HOUSTON INDUSTRIES, INCORPORATED; HOUSTON LIGHTING & POWER COMPANY; DON D. JORDAN; DON D. SYKORA; HUGH RICE KELLY; STEVE LETBETTER; ED TURNER; LEE HOGAN; JACK GREENWADE; DON HALL; L. CHAPMAN SMITH; SUSAN FABRE; STEPHEN SCHAEFFER; MCKINSEY & COMPANY, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. **Whether, as Petitioners Assert, This Case Presents an Appropriate Vehicle for deciding if the Common Law Doctrines of Ratification and Tender of Consideration Prior to Seeking Rescission May Apply After Passage of the Older Workers Benefit Protection Act ("OWBPA") Since the District Court Did Not Rely on These Doctrines at All to Support Its Decision and the Court of Appeals Merely Cited These Doctrines in Dicta.**

B. **Whether, as Petitioners Imply, the Releases They Signed That Waived Their Right to Sue Respondents for Any Claims Arising Out of Their Separation From Employment Did Not Comply in All Respects with the Requisites of the OWBPA.**

C. **Whether the Fifth Circuit Properly Applied the Common Law Doctrines of Ratification and Tender-Back of Consideration to the Releases Signed by Petitioners After the Passage of the OWBPA.**

D. **Whether Petitioners Can Now Claim an Entitlement to an Additional Sixty-Days' Pay When the Releases They Signed Clearly Defined the Consideration They Were Supposed to, and Did, Receive.**

E. **Whether Petitioners Can Assert an ERISA Claim Not Raised Before the District Court or the Court of Appeals.**

PARTIES TO THE PROCEEDINGS

Petitioners:
BARBARA NORTON; GLORIA MCLINTON; IDA LEE SMITH; CHARLES SOLOMON; LEWIS A. WARD, JR.; GLENDA F. PATRICK; TERRY HUNTER; PAULETTE GADISON; MICAH SIMS; IDA NEAL; VIRGINIA SMALL; LEE ANDERSON; ROBERT ARORA; HERRMAN AUGUSTIN; RACHEL ANZALDUA; JAMES AUTRY; CHIKE J. OGBOENYIYA; CHARLES PACE; CHRISTINE VILLARREAL; NANETTE YELDER; LANG VAN BUI; VICTOR WHITE; KERMIT FISHER; ANDREW BEASLEY; ALFREDENE THOMAS; EDWARD FINISTER; ALICE HAYES; REGINALD JEFFERSON; PATSY LEE; DANDY HUNT; THOMAS WELLS, III; LONZO DORN; CORDELIA BELEHU; ALAN RICHARDSON; MARSHALL O'BRIEN; WAYNE HALLMAN; MARY MARTINEZ; SHELIA PHILLIPS; RENEE EDWARDS; LEO AARON, JR.; SYLVIA HERNANDEZ; ELIZABETH ARGUETA; SPENCER JACKSON; JIM BURNS, JR.; LEOLA CRAWFORD; WINSTON PINK; VICTOR SAMPLES; LINDA JOLIVET; LARRY WARD, GLORIA CASTILLO; ANTHONY GARCIA; SANTOS MARTINEZ; AND LINDA SCHWARTZ, Individually and on behalf of all others Similarly Situated

Respondents:
HOUSTON INDUSTRIES, INCORPORATED; HOUSTON LIGHTING & POWER COMPANY; DON D. JORDAN; DON D. SYKORA; HUGH RICE KELLY; STEVE LETBETTER; ED TURNER; LEE HOGAN; JACK GREENWADE; DON HALL; L. CHAPMAN SMITH; SUSAN FABRE; STEPHEN SCHAEFFER; MCKINSEY & COMPANY, INC.

Entities Affiliated With Respondents:
DEVELOPMENT VENTURES, INC.; HOUSTON INDUSTRIES FINANCE, INC.; HOUSTON INDUSTRIES ENERGY, INC.; KBLCOM INCORPORATED; AND UTILITY FUELS, INC.

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NO. 94-1845

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BARBARA NORTON, et al.,
Petitioners,
v.
HOUSTON INDUSTRIES, INCORPORATED, et al.,
Respondents.

On Writ of Certiorari to the Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals, (App., *infra*, 1a - 2a), is unreported. The opinion of the district court, (App., *infra*, 3a - 19a), is reported at 65 EMPL. PRAC. DEC. (CCH) ¶ 43, 252 (S.D. Tex. 1994).

JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 in that this action arose under the laws of the United States, specifically the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34 (1988 & Supp. V 1993), the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f)(Supp. V 1993), and the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1101-1461 (1988 & Supp. V 1993). The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. Petitioners attempt to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED IN THIS CASE

This case implicates the OWBPA, 29 U.S.C. § 626(f), the ADEA, 29 U.S.C. §§ 621-34, ERISA, 29 U.S.C. §§ 1101-1461, and Federal Rule of Civil Procedure 56.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts Below.

Petitioners brought several state and federal suits against Respondents in connection with a reduction-in-force ("RIF") conducted by Respondents in the spring of 1992. This case, *Norton*, and a companion case, *Rachel Anzaldua, et al. v. McKinsey & Co., et al.*, C.A. No. 93-0400 (S.D. Tex.) asserted breach of contract and various tort causes of action under Texas law in connection with Petitioners' terminations and a contemporaneous offer of certain employee benefits in exchange for signing a release. Petitioners timely removed these actions on the basis of federal preemption. *Maria Fuentez, et al. v. Houston Industries, et al.*, C.A. No. H-92-2728 (S.D. Tex.) was a declaratory judgment suit questioning whether Respondents' RIF violated the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-09 (1988). *Charles Pace, et al. v. Houston Industries, et al.*, C.A. No. H-92-3442 (S.D. Tex.) alleged violations of the ADEA and ERISA. Respondents then brought suit against Petitioners' collective bargaining representative in *Houston Lighting & Power Co., et al. v. International Brotherhood of Electrical Workers, Local Union No. 66*, C.A. No. H-92-0430 (S.D. Tex.).[1]

Judge Kenneth Hoyt of the Southern District of Texas consolidated the *Pace*, *Anzaldua*, and *IBEW* suits into *Norton*, C.A. No. H-92-3239. Moreover, since the *Fuentez* suit involved the same releases at issue in the consolidated *Norton* suit, Judge Hoyt consolidated that case into *Norton* for the sole purpose

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[1] Although several of these suits were brought as class actions, the district court refused to certify any classes, (App., *infra*, 18a), and Petitioners have not sought to revisit Judge Hoyt's decision in this regard.

of determining the releases' validity. Thus, although petitioners seek to present this case as one dealing primarily with the ADEA, only one of the consolidated cases (*Pace*) raised such a claim.

After full briefing by both sides on the release issue, the district court granted summary judgment in Respondents' favor on April 5, 1994, finding that Petitioners had knowingly and voluntarily executed the releases. (App., *infra*, 16a.) Subsequently, the court of appeals held on February 10, 1995 that the district court's judgment was "correct, essentially for the reasons given by the district court." (App., *infra*, 1a - 2a.) As an additional ground for affirming the decision of the district court, the court of appeals found that, even if the releases had been invalid, the Petitioners ratified them by failing to tender the consideration received before seeking rescission. (App., *infra*, 2a.)

B. Statement of Facts.

The Petitioners are former employees of Respondent Houston Lighting & Power Company ("HL&P"), a wholly owned subsidiary of Respondent Houston Industries, Incorporated ("HII"), and former employees of Respondent Utility Fuels, Inc. ("UFI"), previously an HII subsidiary that has since merged into HL&P. Respondent McKinsey & Co. is a consulting firm used by HII in connection with the 1992 reorganization of its workforce. The individual Respondents are all officers and/or agents of HL&P, UFI, or HII.

Petitioners allege that Respondents violated the ADEA, ERISA, and Texas common law when they notified Respondents on or before April 6, 1992 of their selection for severance from HL&P and UFI as part of a RIF of approximately 1,100 workers. HL&P and UFI told all affected employees that their terminations would take effect sixty days hence. During this sixty-day notification period, employees slated for termination, including Petitioners, continued to receive their full salaries and benefits. They were not required to report to work or to perform any job duties, and they received free career transition services. (App., *infra*, 20a.)

The HII and HL&P Success Through Excellence Program ("STEP") and the UFI Organizational Effectiveness Analysis Program ("OEAP") Severance Pay Plans offered severed

employees significantly enhanced severance benefits in exchange for a release that relinquished their right to sue Respondents on claims relating to their employment with or their separation from Respondents. (App., *infra*, 22a - 25a.) Approximately 98% of the putative plaintiffs signed releases. Only one of these individuals (Maria Fuentez)[2] timely revoked her acceptance of the release. Petitioners suggestion that any of the rest of them timely revoked is specious. (Pet. at viii.)

Respondents offered Petitioners various severance benefits in exchange for signing a release of all claims "related in any way to my employment with or separation from the Company or its affiliates," (App., *infra*, 24a,) and they gave Petitioners at least forty-five days to consider whether to sign the release, and seven days for revocation, as outlined clearly in the release and accompanying documents.[3] Any suggestion by Petitioners that they did not know that they had forty-five days to consider the severance package offer is thus incorrect. Respondents advised Petitioners considering the offer to consult an attorney. (App., *infra*, 11a.)

The Severance Program brochure that each Petitioner received described in detail the benefits available to employees involuntarily terminated under authorized staff reduction plans at HL&P and UFI. The brochures included a table for determination of the lump-sum severance pay benefits available if the individual elected to participate in the program. The brochures described the enhanced welfare and pension benefits that individuals who elected to participate in the programs would

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[2] Ms. Fuentez is not a Petitioner; indeed, her action against Respondents has been set for trial.

[3] Each individual severed from HL&P or UFI in the 1992 RIF received a copy of a release offer letter, (App., *infra*, 20a-21a,) the Houston Industries Incorporated Severance Pay Plan Agreement and Release Information Sheet (the "Information Sheet"), (App., *infra*, 22a-23a), a copy of the HII Severance Pay Plan Summary Plan Description and Plan Document, and a copy of the release. (App., *infra*, 24a-25a.)

receive.[4] The brochures also advised Savings Plan participants of their final distribution options. Finally, the brochures described the lesser benefits available to individuals who elected not to execute a release or who timely revoked a release. (App., *infra*, 22a.)

The release the Petitioners executed acknowledged their understanding that signing the release was an important legal act and that Respondents had advised them to consult an attorney. (App., *infra*, 24a.) In exchange for payment of the severance benefits described in the Plan Document, each individual agreed not to sue Respondents, and waived

> all claims and release[d] [HII], its affiliates, its employee benefit plans, their directors and officers, fiduciaries, employees and agents from liability and damages related in any way to my employment with or separation from the Company or its affiliates. This waiver and release includes, but is not limited to, claims and causes of action under Title VII of the Civil Rights Act of 1964, as amended; the Civil Rights Act of 1991; the ***Age Discrimination in Employment Act of 1967***, as amended; the Civil Rights Act of 1966; the Texas Commission on Human Rights Act; the Americans with Disabilities Act; the ***Older Workers Benefit Protection Act of 1990***; the ***Employee Retirement Income Security Act of 1974***, as amended . . . the Workers Adjustment and Retraining Notification Act; all state and federal statutes and regulations; all oral or written contract rights; and the common law, such as tort or personal injury of any sort.

(App., *infra*, 24a (emphasis added).)

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[4] These enhanced benefits included continued medical, dental, and life insurance as well as retirement and savings benefits. The specific benefits available to each individual depended upon years of service and were described in the brochures.

In addition, in order to comply with the Older Workers Benefit Protection Act of 1990 ("OWBPA"), 29 U.S.C. § 626(f),[5] HL&P provided Petitioners with a list of individuals selected to receive the offer of Plan benefits and a list of individuals not selected to receive the offer, identified by age and job title.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Because the Decisions Below Did Not Rely Solely, or Even Primarily, on the Ratification/Tender-Back Doctrines, This Case Does Not Represent an Appropriate Vehicle for Reaching the Merits of the Central Issue Raised in the Petition.

Petitioners' claim that a circuit split on the question whether the common law doctrines of ratification and tender-back doctrines may apply to releases of age discrimination claims after the enactment of the OWBPA provides a compelling reason for this Court to review the case at bar.[6] While Respondents do not dispute that the circuits have taken different views about this subject, this case is not an appropriate one for resolving those differences. Specifically, because the ratification/tender-back issue was not necessary to support the decisions below, the Court should not choose the instant case to resolve this question.

In a thorough opinion, the district court reviewed each provision of 29 U.S.C. § 626(f) and found that Respondents complied with it in conducting their 1992 RIF. (App., *infra*, 16a.) Although Respondents raised the issue of ratification and the failure to tender the consideration received, the district court did not discuss this contention, and certainly the court did not rely on it in granting summary judgment to Respondents, contrary to

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[5] Pub. L. No. 101-433, 104 Stat. 983 (1990).

[6] Pet. at 3-5.

Petitioners' assertion.[7] (App., *infra*, 11a - 18a.) On appeal, the Fifth Circuit endorsed the district court's rationale, noting that Respondents' "summary judgment evidence showed that the releases were valid and in accordance with the law, and [Petitioners] produced no summary judgment evidence to support a contrary finding." (App., *infra*, 2a.) The Fifth Circuit's holding thus rested on the conclusion that the releases met the requirements of the OWBPA. (App., *infra*, 2a.) The court of appeals' subsequent, alternative holding that the Petitioners failed to tender-back the consideration they received for the releases, thereby ratifying them, was thus unnecessary to its decision. (App., *infra*, 2a.) In short, an adequate and independent ground for granting and affirming summary judgment in favor of Respondents appears in the record and was relied on by the courts below, justifying the denial of the instant petition for certiorari.[8]

Consequently, the presence of this alternative, equally meritorious basis for the grant of summary judgment in this case demonstrates that the decision of the Fifth Circuit is correct without regard to the questions sought to be raised by Petitioners. As a result, this Court would not be likely to reach

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[7] Specifically, Petitioners assert that "[t]he district court found that the Employees ratified the release." Pet. at 6; *see also id.* at viii. While Respondents assume Petitioners made this statement in good faith, it is simply and entirely incorrect. The district court did not in any way base its holding on ratification or failure to tender; indeed, these doctrines are never even referred to in the opinion. (App., *infra*, 3a-19a.)

[8] *See, e.g., Sommerville v. United States*, 376 U.S. 909 (1964)(denying certiorari even though a live conflict existed as to whether federal or state law controlled because it was evident that the resolution of the conflict could not change the result reached below); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959)("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the [issue in conflict among the circuits] can await a day when the issue is posed less abstractly.").

the alleged points of importance or the alleged conflict referred to by Petitioners, and it should deny the petition for certiorari.[9]

B. The Court Should Deny Certiorari Because the Releases at Issue Complied with the OWBPA and Were Valid on the Merits.

The OWBPA, enacted on October 16, 1990, requires compliance with certain informational and procedural requisites in order to validly waive ADEA rights. As the courts below determined, the releases signed by petitioners satisfied all of the requirements for a "knowing and voluntary" release under the OWBPA. (App., *infra*, 2a, 18a.)[10]

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[9] Alternatively, Respondents observe that the issue of ratification and a tender-back requirement after the passage of the OWBPA in 1990 requires "further consideration" in the lower courts "before it is addressed by this Court." *McCray v. New York*, 461 U.S. 961, 962-63 (1983)(Stevens, J.); *Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983)(Marshall, J., dissenting)(dissenting from the denial of certiorari and observing that the remaining Justices "believe that this Court should postpone consideration of the issue until more State Supreme Courts and federal circuits have experimented with substantive and procedural solutions to the problem"). This Court recently declined to review the contrasting views of the Seventh Circuit in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir.), *cert. denied*, 114 S. Ct. 2104 (1994) and the Fifth Circuit in *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1405 (1995), which squarely presented the ratification and tender-back issues. If the Court deems these issues worthy of review, Respondents respectfully suggest that a case in which these questions are more clearly implicated will present itself in the not-too-distant future.

[10] Under § 201 of the OWBPA, a waiver requested in connection with an "exit incentive or other employment termination program offered to a group or class of employees" must meet the following minimum standards:

> (A) the waiver must be a portion of an agreement between the employer and the employee "that is written in a manner calculated to be understood by such individual, or by the average individual eligible to

One commentator has concluded that "[i]f the 'laundry list' of requirements is followed, a waiver of ADEA

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participate";

(B) the waiver must mention that it encompasses rights or causes of action arising under the ADEA;

(C) the waiver does not release claims or rights that "may arise after" the date the waiver is signed;

(D) the release must be supported by valid consideration, i.e., an individual may validly waive his rights only if the relief gives him monies or other benefits to which he had no pre-existing right;

(E) the employer must advise the individual in writing to consult with an attorney prior to signing the release;

(F) the employer must allow the employee at least forty-five days within which to consider the waiver;

(G) the release must state that for a period of at least seven days following its execution, the individual may revoke the release, and "the agreement shall not become effective or enforceable until the revocation period has expired";

(H) at the beginning of the (at least) forty-five-day period during which the employee may consider the waiver, the employer must inform the employee in language likely to be understood by the ordinary participant of the following:

i) any class, unit, or group of individuals covered by the program, the program's eligibility requirements, and the program's time limits, if any; and

ii) the job titles and ages of persons eligible or selected for the program, as well as the ages of all individuals "in the same job classification or organizational unit who are not eligible or selected for the program."

29 U.S.C. § 626(f)(1). For an explication of these requirements and ADEA waivers post-OWBPA, *see generally* Bennet D. Alsher, *Validity of Waivers in Discrimination Cases*, 42 Lab. L.J. 81, 89-91 (1991).

rights should withstand legal challenge."[11] The legislative history of the OWBPA supports this view. Specifically, the report of the Senate Labor and Human Resources Committee indicates that the additional informational and procedural requirements applicable to the waiver of an ADEA claim are merely intended to ensure that such a waiver is "knowing and voluntary. At a minimum, the waiving party must have genuinely intended to release ADEA claims and must have understood that he was accomplishing this goal." S. Rep. No. 263, 101st Cong., 2d Sess. 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537.[12] Moreover, the Senate report declares that a waiver of rights, even an unsupervised one, "is generally available as an affirmative defense." *Id.* at 35, *reprinted in* 1990 U.S.C.C.A.N. at 1540. Thus, a waiver is "valid" if "[a]ll of the criteria discussed above [in 29 U.S.C. § 626(f) have been] . . . met." *Id.*

In the present case, the Respondents satisfied each of the OWBPA's requirements for a valid release in connection with an "exit incentive" program offered to a group of employees, *see* 29 U.S.C. § 626(f)(1)(F)(ii):

(a) Clarity of the release. The statute demands that the release be part of an employer-employee agreement that is written in a manner "calculated to be understood by . . . the average individual eligible to participate." *Id.* § 626(f)(1)(A). Furthermore, the waiver must expressly mention that it includes claims arising under the ADEA. *Id.* § 626(f)(1)(B). The release offered by Respondents fully complied with these requirements, as the courts below held. (App., *infra*, 15a.) Specifically, the release was a one-page document, printed in normal type, which was conspicuously titled "Agreement and Release." (App., *infra*, 24a - 25a.) Moreover, the release advised each Petitioner in simple terms that he or she was waiving valuable rights in exchange for certain enhanced severance benefits. Each Petitioner also received an Information Sheet and a copy of the HII

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[11] Alsher, *supra* note 10, at 91.

[12] The Senate Report constitutes the authoritative legislative history for the OWBPA because "[]the Senate bill was passed [by Congress] in lieu of the House bill." 1990 U.S.C.C.A.N. 1509.

Severance Pay Plan Summary Plan Description and Plan Document that detailed the enhanced severance benefits available if a release was timely executed and not revoked. (App., *infra*, 22a - 23a.) Additionally, the release explicitly stated that an employee who signed it was waiving any and all rights under the ADEA, ERISA, and "all claims," including "all state and federal statutes and regulations; all oral and written contract rights; and the common law." (App., *infra*, 24a.) Consequently, as the district court correctly determined, "[c]larity is not an issue here." (App., *infra*, 15a.)

(b) **No waiver of future rights.** The OWBPA then requires that a waiver not attempt to release future rights, i.e., those arising after "the date the waiver is executed." 29 U.S.C. § 626(f)(1)(C). The courts below correctly concluded (and the Petitioners do not dispute) that the Respondents notified the Petitioners by April 6, 1992 that their employment would terminate in June 1992. Moreover, it is undisputed that the Petitioners signed the releases between April 14 and May 30, 1992. Since any cause of action relating to the Petitioners' discharges arose when each employee was notified of his or her impending discharge (at the latest on April 6, 1992), not on the termination date in June 1992, the releases did not waive future rights. *See Chardon v. Fernandez*, 454 U.S. 6, 28 (1981) (per curiam)(holding that plaintiffs' § 1983 claims were barred by limitations and noting that causes of action arose on the date plaintiffs were *notified* of their discharges, not on the actual date of termination); *Delaware State College v. Ricks*, 449 U.S. 250, 259 (1980). In this case, all of the Petitioners' causes of action relate to their loss of employment and thus had already accrued at the time they executed the releases. Because those claims existed when Petitioners signed the releases, the releases waived existing claims, which are now barred.

(c) **Valid consideration.** A plaintiff must have signed the release in exchange for adequate consideration to which he had no preexisting right. 29 U.S.C. § 626(f)(1)(D). Each terminated employee, regardless of whether he or she signed a release, received "60 days' salary and benefits" and was "eligible for COBRA (18-month) extension of medical and dental coverage, and any benefits [they] were otherwise entitled to under the

Retirement Plan for Employees of Houston Industries Incorporated and the Savings Plan of Houston Industries Incorporated." Petitioners who timely signed releases received *additional* benefits, including lump-sum severance benefits ranging from four to forty-four weeks' pay, continued medical, dental and life insurance, an enhanced pension (depending upon age and years of service), and free career transition services. Plainly, these benefits were more than a "token" and constituted remuneration to which the participants had no preexisting right. *Schmitt-Norton Ford, Inc. v. Ford Motor Co.*, 524 F. Supp. 1099, 1103 (D. Minn. 1981), *aff'd mem.*, 685 F.2d 438 (8th Cir. 1982). Consequently, the Petitioners all received adequate additional consideration for signing the release, satisfying this portion of the OWBPA test.

(d) Advise releasor to consult attorney. The employer must suggest that the employee consider consulting with an attorney before signing the release. 29 U.S.C. § 626(f)(1)(E). In the present case, Respondents admonished all employees eligible for the Severance Pay Plan as follows: "Your decision to waive these claims and rights is an important legal act, and **you should consult with an attorney** before executing this Agreement and Release." (App., *infra*, 23a.) In addition, the release itself states, "I acknowledge that the Company has advised me to consult an attorney before signing this Agreement and Release." (App., *infra*, 24a.) These statements fully discharged Respondents' duty under the statute. *Cf. Rogers v. General Elec. Co.*, 781 F.2d 452, 456 n.7 (5th Cir. 1986) (finding a knowing and voluntary release in a Title VII case and stating that "[t]he fact that Rogers did not actually consult an attorney prior to executing the release does not require this Court to find that the waiver was not knowing").[13]

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[13] *See also Leavitt v. Northwestern Bell Tel. Co.*, 921 F.2d 160, 163 (8th Cir. 1990) (finding effective waiver of ERISA rights and stating that "[t]he release advised Leavitt of his right to consult an attorney, but Leavitt chose to sign the release without obtaining legal advice"); *Ponzoni v. Kraft Gen. Foods, Inc.*, 774 F. Supp. 299, 312 (D.N.J. 1991) ("Even where a plaintiff does not seek counsel, an express statement regarding his or her right to do so satisfies this factor."), *aff'd*, 968 F.2d 14 (3d Cir. 1992).

(e) Time to consider offer. Respondents must have allowed Petitioners at least forty-five days to decide whether to sign the releases. 29 U.S.C. § 626(f)(1)(F)(ii). In the instant case, Respondents provided the minimum forty-five days for consideration as stated expressly in the Information Sheet and accompanying materials. (App., *infra*, 21a - 22a.) Petitioners' argument is misleading on this point in stating that "the releases did not mention that the Employees had at least 45 days to consider the release." (Pet. at viii.) The releases clearly incorporated by reference documents provided to each Petitioner that conspicuously pointed out the forty-five-day period. The courts below properly discounted Petitioners' contention of a lack of notice of the forty-five-day window, finding that the Plaintiffs "had the required time within which to consider the release." (App., *infra*, 15a.) This Court should likewise reject Plaintiffs' unsubstantiated and baseless allegations. *Cormier v. Pennzoil Exploration & Prod. Co.*, 969 F.2d 1559, 1561 (5th Cir. 1992) (construing Federal Rule of Civil Procedure 56 to mean that hearsay contained in summary judgment affidavits and pleadings is inadmissible to the same extent it is inadmissible at trial). Moreover, even if there were summary judgment evidence to support these allegations, it would not raise a triable issue of fact because Respondents indisputably gave Petitioners the statutorily mandated forty-five days to sign the release, as conceded by Petitioners. (Pet. at viii ("[T]he release had to be received by the company within the required 45 days.").)

(f) Allow seven days for revocation. Respondents were required to allow Petitioners seven days to revoke their acceptance of the offer contained in the release. 29 U.S.C. § 626(f)(1)(G). As mentioned above, Respondents informed Petitioners that they had forty-five days to consider the offer contained in the release and seven days after execution of the release to revoke the offer. (App., *infra*, 21a, 23a, 25a.) The record unquestionably establishes that only one individual, Maria Fuentez, revoked her release within the seven-day revocation period. Because Respondents complied with the express language of the OWBPA, they fulfilled their statutory duty and satisfied this prong of the waiver test. Petitioners' unsupported allegation that employees other than Ms. Fuentez were not allowed to make out-

of-time revocations[14] in no way affects Respondents' compliance with the statute. The courts below, by all accounts, were aware of Petitioners' alleged attempts at late revocation and rejected them as a basis for avoiding the releases.

(g) Provide termination information. Respondents were required to provide the Petitioners, at the beginning of the forty-five-day consideration period, information about the groups of employees who were eligible for the exit incentive program in connection with which the releases were offered as well as lists of the job titles and ages of those not eligible for the program. 29 U.S.C. § 626(f)(1)(H). Respondents complied with this requirement by providing the lists of individuals eligible and ineligible for the Severance Plan, their job titles, and their ages in simple language. Respondents therefore satisfied this portion of the OWBPA test.

Accordingly, as the courts below properly determined, (App., *infra*, 2a, 16a,) the release offered by Respondents and accepted by Petitioners comported with every requirement of the OWBPA's "laundry list," rendering the releases "knowing and voluntary" as a matter of law. 29 U.S.C. § 626(f); *see also* S. Rep. No. 263, at 35, *reprinted in* 1990 U.S.C.C.A.N. at 1540. The Court should therefore deny the petition because the questions presented by Petitioners are irrelevant to the result reached on the merits by the district court and the Fifth Circuit that the releases comported with the OWBPA.

C. The Court Should Deny the Petition Because There Is No Conflict Between the Court of Appeals' Application of the Common Law Ratification/Tender-Back Doctrines to ADEA Claims and This Court's Decision Not to Invoke Those Doctrines in Connection with FELA Claims.

1. In Order to Prevent the Application of Federal Common Law Contract Doctrines to Petitioners' ADEA Releases, Petitioners Would Have to

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[14] Pet. at viii; *id.* at 7.

Demonstrate That Congress Intended to Abrogate the Common Law in Enacting the OWBPA.

Petitioners correctly point out that federal law, rather than state law, governs the validity of releases of federal causes of action, such as those brought by the Petitioners under the ADEA, 29 U.S.C. §§ 621-34. *See, e.g., Maynard v. Durham & S. Ry.*, 365 U.S. 160, 161 (1961); *Rogers v. General Elec. Co.*, 781 F.2d 452, 454 (5th Cir. 1986).[15] Although this Court has not directly addressed the validity of a release of claims under the ADEA, it noted in passing on a related question involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993), that waivers of rights under federal antidiscrimination statutes must satisfy a "voluntary and knowing" standard. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 & n.15 (1974).[16] That federal law controls the validity of such waivers does not end the inquiry, however.

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[15] Interestingly, Petitioners do not complain about the findings of the lower courts that the releases they signed bar their ERISA claims.

[16] Several courts of appeals have specifically held that waivers of ERISA claims must satisfy this "knowing and voluntary" standard. *See, e.g., Rodriguez-Abreu v. Chase Manhattan Bank*, 986 F.2d 580, 587 (1st Cir. 1993) ("ERISA does not prohibit a knowing and voluntary relinquishment of employee benefits."); *Laniok v. Advisory Comm. of Brainerd Mfg. Co. Pension Plan*, 935 F.2d 1360, 1365 (2d Cir. 1991) (holding that an individual can waive rights under ERISA if the waiver "is made knowingly and voluntarily"); *Leavitt v. Northwestern Bell Tel. Co.*, 921 F.2d 160, 162 (8th Cir. 1990) (stating that parties "can settle a claim . . . under ERISA if the claim is knowingly and voluntarily released"). Likewise, this same general standard governed releases of causes of action under the ADEA prior to its replacement with the specific requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f). *See, e.g., O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 361 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991); *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989); *Shaheen v. B.F. Goodrich Co.*, 873 F.2d 105, 106-08 (6th Cir. 1989).

A release, after all, is a creature of contract. *See, e.g., Fleming v. United States Postal Serv. AMF O'Hare*, 27 F.3d 259, 262 (7th Cir. 1994); *Bank One, Tex., N.A. v. Taylor*, 970 F.2d 16, 22 (5th Cir. 1992)(applying Texas law) *cert. denied*, 113 S. Ct. 2331 (1993); *Bartel Dental Books Co. v. Schultz*, 786 F.2d 486, 488 (2d Cir.), *cert. denied*, 478 U.S. 1006 (1986); 76 C.J.S. *Release* § 38 (1994). Accordingly, the federal courts by necessity have crafted a body of special federal common law, drawn largely from general contract law and the RESTATEMENT (SECOND) OF CONTRACTS (1981), to fill the interstices left by Congress' creation of federal statutory rights that can be released.[17] The absence of explicit congressional guidance on the issue of releases of federal civil rights led some federal courts to supplement the vague "knowing and voluntary" standard with a "totality of the circumstances" test, which includes a number of considerations for determining the validity of a release,[18] while others endorsed a less stringent analysis under "ordinary contract principles."[19] The

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[17]The federal courts' case-by-case creation of the federal common law, or "perhaps more accurately [the] 'law of independent federal judicial decision,'" *United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947), accords with this Court's guidance concerning the waiver of rights conferred by federal statutes. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).

[18] *See Finz v. Schlesinger*, 957 F.2d 78, 81 (2d Cir.), *cert. denied*, 113 S. Ct. 72 (1992); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990); *Bormann*, 875 F.2d at 403; *Cirillo v. Arco Chem. Co.*, 862 F.2d 448, 452 (3d Cir. 1988).

[19] *See, e.g., O'Shea*, 930 F.2d at 362; *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d. 539 541 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987); *Runyan v. National Cash Register Corp.*, 787 F.2d. 1039, 1045 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986).

differences in these tests often appeared more semantic than real, and courts frequently reached the same results under both.[20]

Petitioners, relying on authority from the Seventh[21] and Eleventh Circuits,[22] contend that the passage of the OWBPA, in 1990, in which Congress established a set of specific criteria for determining whether an ADEA waiver, as distinguished from waivers of other statutory claims, was executed knowingly and voluntarily,[23] has "occupied [the field in] this area of the law."[24] In and of itself, Petitioners' theory would not present an untenable construction of the OWBPA. The difficulty stems from the contrary positions taken by the Fourth and Fifth Circuits, which, in connection with their resolution of releases of ADEA claims both pre- and post-OWBPA, borrowed from the RESTATEMENT (SECOND) OF CONTRACTS and general contract law the doctrines of ratification and tender-back of the consideration received in order to seek rescission.[25] In essence, the Petitioners

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[20] *See O'Shea*, 930 F.2d at 362 & n.2; *Mullen v. New Jersey Steel Corp.*, 733 F. Supp. 1534, 1548 (D.N.J. 1990).

[21] *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994).

[22] *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992).

[23] *See* S. Rep. No. 263, 101st Cong., 2d Sess. 31-32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537.

[24] Pet. at 4.

[25] *See Wittorf v. Shell Oil Co.*, 37 F.3d 1151, 1154 (5th Cir. 1994); *Wamsley v. Champlin Ref. & Chem., Inc.*, 11 F.3d 534, 538-39 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995); *O'Shea*, 930 F.2d at 362 ("It is a well-established proposition that the retention of the benefits of a voidable contract may constitute ratification."); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991) ("A party cannot be permitted to retain the benefits received under a contract and at the same time escape the obligation imposed by the contract."); *see also Cumberland & Ohio Co. v. First Am. Nat'l Bank*, 936 F.2d 846, 850 (6th

argue that, in enacting the OWBPA, Congress spoke with such clarity and precision that no room remained for the federal courts to apply common law principles, such as the ratification and the tender-back requirements, that had heretofore guided them in passing on the validity of releases of federal statutory rights. Acceptance of this proposal, of course, demands that Petitioners elucidate a "clear and explicit" congressional intent to supplant preexisting common law doctrines. *Norfolk Redev. & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35-36 (1983). Furthermore, Petitioners must contend with the well-established rule that "[C]ourts may take it as a given that Congress has legislated with an expectation that the [common law] principle[s] will apply except when a statutory purpose to the contrary is evident." *United States v. Texas*, 113 S. Ct. 1631, 1635 (1993) (internal quotation marks omitted, alteration in original).[26] Finally, "there is no support . . . for the proposition that [this] presumption has no application to federal common law." *United States v. Texas*, 113 S. Ct. at 1634.

The issue raised by Petitioners centers on whether the enumeration of specific requirements for finding the release of an ADEA claim to be "knowing and voluntary" under 29 U.S.C. § 626(f) necessarily abrogated federal common law doctrines such as ratification and tender of consideration. When Congress acts with this purpose in mind, its intent is unmistakable. In the present case, the legislative history of the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1988), the statute on which Petitioners base their "no ratification" and "no tender"

Cir. 1991), *cert. denied*, 502 U.S. 1034 (1992); *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985); RESTATEMENT (SECOND) OF CONTRACTS §§ 7, 85 (1981); 76 C.J.S. *Release* § 40 (1994).

[26] *See also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991); *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 236 (1985); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

arguments, as well as the texts and statutory purposes of the ADEA and the OWBPA, demonstrate that they were designed to further different purposes and dealt with the existing common law in radically different ways, thereby justifying the refusal to adopt the common law in releases of FELA claims, but permitting the common law's adoption in with respect to age discrimination claims.

2. FELA Was Primarily Intended to Provide Recovery Under a Diminished Standard of Causation for the Physical Injuries of Railroad Employees.

Congress enacted FELA to provide remedies to railroad employees for injuries and death resulting from accidents on interstate railroads. 45 U.S.C. § 51; *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396, 2403 (1994).[27] When FELA was originally passed in 1908, hundreds of thousands of workers per year were losing their lives, or suffering terrible injuries, while working for railroads. *See* Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 160, 167-68 (1953)(quoting 45 Cong. Rec. 4034 (1910)). Congress designed FELA to address these physical injuries, i.e., "'to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations.'" *Gottshall*, 114 S. Ct. at 2404 (quoting *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring)).

The language of FELA is "as broad as could be framed," *Urie v. Thompson*, 337 U.S. 163, 181 (1949), and provides a remedy for any person injured while employed by a railroad "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of [a railroad]." 45 U.S.C. § 51. Consistent with the broad

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[27] *See also Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 561 (1987)("Congress enacted the FELA to provide a federal remedy for railroad workers who suffer personal injures as a result of the negligence of their employer or their fellow employees.").

language of the statute, and its "humanitarian purposes," this Court has "liberally construed FELA to further Congress' remedial goal." *Gottshall*, 114 S. Ct. at 2404. An employer may incur liability under FELA if "'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Id.* (quoting *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957)).

Thus, the Supreme Court has upheld jury verdicts in cases that might have had difficulty surviving at common law.[28] This Court and lower courts have construed the statute to provide a per se negligence recovery when employees are injured because of statutory violations, even when the injuries were not the type the statute originally sought to prevent. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 432-36 (1958). "Indeed, in the spirit of broad construction, the FELA has been construed to cover some intentional torts even though its text only mentions negligence." *Buell*, 480 U.S. at 562 n.8. In establishing "a relaxed standard of causation . . . under FELA," Congress *expressly* abolished the common law defenses of assumption of risk and contributory negligence and prevented covered employers from contracting around FELA liability. *Gottshall*, 114 S. Ct. at 2404; *see also* 45 U.S.C. §§ 53-54; Griffith, *supra*, at 168 (citing 45 Cong. Rec. 4034 (1910)). In sum, "[a] primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Buell*, 480 U.S. at 561.

Even so, this Court has observed that common law principles, "unless they are expressly rejected in the text of the statute, . . . are entitled to great weight" in FELA cases. *Gottshall*, 114 S. Ct. at 2404; *Buell*, 480 U.S. at 1417 ("FELA jurisprudence gleans guidance from common law developments."). As a result, when Congress explicitly sought to depart from the common law, as with the abolition of the contributory negligence and assumption of risk rules, this Court has respected that

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[28] *See, e.g., Gallick v. Baltimore & O.R.R.*, 372 U.S. 108, 113 (1963) (holding a jury had sufficient evidence to find FELA liability when an employee lost both of his legs after an insect bite, on the theory the insect was attracted to a stagnant pool which the railroad knew about).

legislative intent. *Gottshall*, 114 S. Ct. at 2404. When Congress has been silent on an issue implicating the common law vis-a-vis FELA or other law, however, the Court has determined that "common-law principles must play a significant role in [its] decision." *Id.* In short, when Congress seeks to displace the common law, under FELA or any other statute, it knows how to make plain that intent. That intent was clearly evidenced in FELA, but that fact does not ensure the same result under any other statute.

Another distinguishing feature of FELA centers on its hostility toward contractual limitations of liability, such as releases. When the FELA was passed, railroad employees were at the mercy of railroad attorneys on the one hand, trying to cheaply buy employees out of their claims, and "ambulance chasing lawyer[s]" on the other. Griffith, *supra*, at 169-73. "In many cases settlements wholly inadequate in the light of the seriousness of the injuries and the responsibility of the employers, had been made with [injured workers] who were either entirely devoid of any knowledge of their rights in such matters, or who had been induced to make cheap settlements by misrepresentations indulged in by those who sought to effectuate these settlements." *Id.* at 173. Recognizing the potential for this abuse, when Congress passed FELA in 1908, it also enacted a section of the statute that specifically disallows employers from contractually limiting their FELA liability. FELA provides that "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void." 45 U.S.C. § 55; *see also Buell*, 480 U.S. at 561. Even with such explicit language, the Supreme Court originally did not ban releases of FELA claims. In *Callen v. Pennsylvania Railroad*, 332 U.S. 625 (1948), the Court held § 55 did not bar a release of claims. The Court carefully distinguished a release from the language of 45 U.S.C. § 55.

> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for

> how much, Congress has not said that parties may not settle their claims without litigation.

Callen, 332 U.S. at 630-31.

Against this historical and legislative backdrop, the Court in *Hogue v. Southern Railway*, 390 U.S. 516 (1968)(per curiam), did not overrule *Callen*, but it did state a rule which seemed more in keeping with the particular purposes of the FELA. *Hogue* held that injured railroad workers did not have to tender-back the consideration they received from the railroad before filing suit under the FELA. *Id.* at 517-18. In so holding, however, the *Hogue* Court specifically grounded its decision on the public policy embodied by FELA:

> [A] rule which required a refund as a prerequisite to institution of suit **would be "wholly incongruous with the general policy of the Act** to give railroad employees a right to recover just compensation for injuries negligently inflicted by their employers." Rather **it is more consistent with the objectives of the Act to hold, as we do,** that it suffices that, except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due to the injured employee.

Id. at 518 (citation omitted) (emphasis added). In short, the Fifth and Fourth Circuits' decisions to apply the common law in lieu of *Hogue* in the context of ADEA releases[29] derives largely from the fact that *Hogue* construed the specialized liability scheme established by FELA.[30]

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[29] *Wamsley*, 11 F.3d at 540-41; *O'Shea*, 930 F.2d at 362-63.

[30] As Chief Judge Posner of the Seventh Circuit noted in *Fleming*, "we do not think the Supreme Court's decision in *Hogue* can be detached from its context." 27 F.3d at 261. Interestingly, although the *Fleming* court had no occasion to address directly whether *Oberg* was correctly decided, the Seventh Circuit did observe that the rationale behind *Oberg* was "a little obscure." *Id.*

3. In Enacting the ADEA, and Specifically, the OWBPA, Congress Sought to Address Very Different Concerns and Promote Very Different Policies Than Those at Issue in FELA.

As noted by this Court, the primary focus of the ADEA centers on "'promot[ing] [the] employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991)(third alteration in original)(quoting 29 U.S.C. § 621(b)). Unlike FELA, the aggrieved ADEA plaintiff is not entitled to an almost guaranteed right of recovery if he can show that he was injured. Importantly, an employee's right to pursue legal remedies occurs only after the Equal Employment Opportunity Commission ("EEOC") has attempted to pursue informal methods of conciliation, and only if the EEOC does not want to pursue the employee's claim on its own. 29 U.S.C. § 626(d) (1988). While the FELA was designed primarily to give legal remedies to workers who were physically injured, the ADEA "is not a general regulation of the workplace but a law which prohibits discrimination." *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 886 (1995); *see also* 29 U.S.C. §§ 623, 626 (1988 & Supp. V 1993). The amounts owing for ADEA violations will only be "unpaid minimum wages or unpaid overtime compensation." 29 U.S.C. § 626(b). Liquidated damages are payable only for willful violations. *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1708 (1993). Moreover, the statutory exceptions to the ADEA give employers specific justifications for discharging older workers. *See* 29 U.S.C. § 623(f) (1988 & Supp. V 1993). For example, the ADEA specifically states that an employer can terminate an older employee for good cause, and may discriminate against older employees if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f). In addition, unlike FELA's "liberal construction . . . by this Court," *Urie v. Thompson*, 337 U.S. 163, 182 (1949), a defendant incurs liability under the ADEA only where the plaintiff carries his "'ultimate burden of persuasion,'" i.e., shows that he was

unlawfully discriminated against because of his age. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2749 (1993). The fact of discrimination is one that must be affirmatively found, not one that is merely presumed as a result of an adverse employment decision. *Id.* & n.4. Thus, the purpose of the ADEA is not to *guarantee* compensation for older workers, but to *promote* their employment.

Congress enacted the OWBPA waiver provision to ensure that older workers do not waive their rights under the ADEA because of fraud, duress, coercion, or mistake of material fact. S. Rep. No. 263, 101st Cong., 2d Sess. 31-32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537. The OWBPA thus provides certain protections for older workers who were asked to waive their potential age discrimination claims. However, the act is not nearly as paternalistic as the FELA. The OWBPA expressly provided, for the first time, that employees could sign waivers without EEOC supervision. *See* S. Rep. No. 263 at 31, *reprinted in* 1990 U.S.C.C.A.N. at 1537. The EEOC had earlier issued a ruling allowing unsupervised waivers of ADEA claims as long as those waivers were "knowing and voluntary." H.R. Rep. No. 664, 101st Cong., 2d Sess. at 19 (1990). The EEOC reasoned that "requiring government supervision of waivers was at odds with the ADEA goal of ensuring expeditious resolution of disputes." *Id.* Initially, members of Congress rejected the idea of unsupervised waivers, concerned that older workers would be disadvantaged because of the "'inherently different bargaining power of employers and employees.'" *Id.* at 20 (quoting 133 Cong. Rec. S14383 (Oct. 15, 1987)) (remarks of Sen. Melcher, Chairman of the Special Committee on Aging). However, the final version of the Act ultimately followed the EEOC's recommendation, by providing for valid waivers of ADEA claims without EEOC supervision, *see* 29 U.S.C. § 626(f), in stark contrast to FELA's ban on contractual limitations of liability, *see* 45 U.S.C. § 55.

Requiring an employee to tender-back the consideration he received from the release of claim before that employee files suit would be consistent with the goals of the ADEA, and specifically, the OWBPA. Nowhere in the legislative history of the OWBPA did Congress express an intent to prevent federal courts from utilizing common law principles such as ratification. Additionally, the legislative history does not contain

a shred of evidence to support the conclusion that Congress sought to render void, and thus not subject to the doctrines of ratification and tender of consideration, any release not complying in every respect with the requisites of 29 U.S.C. § 626(f). The absence of such an explicit or even implicit directive from Congress casts serious doubt on the viability of the Petitioners' argument. *United States v. Texas*, 113 S. Ct. 1631, 1634-35 (1993). The dearth of commentary in the legislative history of the OWBPA concerning common law doctrines makes the Petitioners' task in carrying this burden virtually insurmountable.

Moreover, such a requirement would not conflict with the ADEA's primary goal of prohibiting age discrimination, for the OWBPA specifically states that no waiver agreement will affect the EEOC's enforcement of the ADEA or will be able to interfere with an employee's right "to file a charge or participate in an investigation or proceeding conducted by the Commission." 29 U.S.C. § 626(f)(4). By contrast, requiring an employee to tender back the consideration of his release before filing suit is consistent with the ADEA's goal of encouraging litigants to settle their disputes informally, without litigation. 29 U.S.C. § 626(b).[31] If employees are not forced to return money they received in consideration for a release of claims before filing suit, the employees will be able "to have it both ways," *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 363 (4th Cir.), *cert. denied*, 112 S. Ct. 177 (1991), which "would encourage releasors with potential ADEA claims to postpone raising such claims and asserting the invalidity of their releases until the latest possible date, because they would have nothing to lose and the continued receipt of release benefits to gain." *Seward v. B.O.C. Div. of Gen. Motors Corp.*, 805 F. Supp. 623, 633 (N.D. Ill. 1992). Employers would soon stop paying employees for their releases thereby thwarting the public policy favoring voluntary settlement.

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[31] *Cf. Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367-68 (1977(observing that Congress has "selected '[c]ooperation and voluntary compliance . . . as the preferred means for achieving' the goal of equality of employment opportunities") (alteration in original); *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 935 (5th Cir. 1994)("Public policy favors voluntary settlement of claims and enforcement of releases").

Williams, 23 F.3d at 935; *Constant v. Continental Tel. Co.*, 745 F. Supp. 1374, 1379 (C.D. Ill. 1990). The text and legislative histories of the ADEA and OWBPA show that Congress never intended this result.

D. Since HL&P Provided All of the Petitioners With Consideration to Which They Were Not Otherwise Entitled, the Releases Were Supported by Valid Consideration, Thereby Defeating Petitioners' Claim to an Additional Sixty Days' Pay.

Petitioners contend, as they have throughout this litigation, that they are somehow entitled to an additional sixty days' pay because they misunderstood the language of the releases they signed and the materials incorporated therein.[32] Petitioners have repeatedly ignored the fact that a release passes muster as long as the employer has offered and the employee has accepted consideration to which the employee was not already entitled. *Maynard v. Durham & S. Ry.*, 365 U.S. 160, 163 (1961); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990). In this case, those individuals who chose not to sign the waiver and participate in the STEP Severance Program still received pay and full benefits for sixty days after notification of selection for separation and the option of extended benefits under COBRA. By contrast, employees who chose to sign a release within forty-five days of receipt of the "Severance Pay Plan" received the following additional benefits, as outlined in the documents provided to all the Petitioners:

> 1) A severance pay benefit equal to a certain number of weeks of pay for each year of service based on a table, with a minimum of 12 weeks (the first 60 calendar days of which will be your severance notification period) and a maximum of 52 weeks (the first 60 calendar days of which will be your severance notification period). See page 5 for determination of the lump-sum

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[32] Pet. at 10-11.

severance pay benefit you will receive after the severance notification period.

2) Continuation of your BenefitsPlus Medical and Dental coverage for you and your dependents, if any, for a stated period based on your age and service.

3) Continuation of your BenefitsPlus Basic Life Insurance Coverage for 12 months following your termination date, unless you receive retiree life insurance benefits instead.

4) An enhanced 65-Point pension if you are vested in the Retirement Plan and the total of your age and years of service equals 65 points or more.

5) Free career transition services.

Clearly, these severance benefits comprised more than a mere "token" and constituted remuneration to which Petitioners had no preexisting right. Furthermore, as noted in sub-paragraph 1 describing these additional benefits, *supra*, Petitioners were on notice that the first sixty calendar days of their additional severance benefits would be a period during which they need not present themselves for work and a period which would coexist with the sixty day period in which all employees would receive their regular pay regardless of whether they signed a release. In short, at a minimum, even the most junior employees who signed releases received, in addition to the other elements of additional consideration, at least four weeks' more pay than non-releasing employees. This constitutes valid and sufficient consideration to support the releases, as the courts properly held below. *See Strozier v. General Motors Corp.*, 635 F.2d 424, 426 (5th Cir. Unit B Jan. 1981)(holding that Plaintiffs "cannot now request additional monetary relief merely because [they are] dissatisfied with the amount [they] voluntarily agreed to accept in the settlement as compensation for [their] claims"). Furthermore, as the district court held, (App., *infra*, 17a - 18a), the unambiguous terms of the summary plan description, the information sheet, and

the release itself prevent the Petitioners from raising a triable fact issue on their multifarious fraud claims.

E. Petitioners Failed to Raise Their ERISA Argument Below, and This Court Should Refuse to Consider It for the First Time in the Petition for Certiorari.

In a variation of their sixty-days' pay argument, Petitioners now seek to assert that Respondents' calculation of their severance benefits violated ERISA. (Pet. at 13.) Petitioners' argument, aside from being patently unmeritorious, arises far too late in this litigation to merit consideration by this Court. As this Court has recognized, even a constitutional right, much less a ground of recovery in civil litigation, may be waived--or deemed waived--by a party's failure to assert the right or claim in a timely manner. *See, e.g., Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991)(declining to entertain issues not raised before the court of appeals); *Michel v. Louisiana*, 350 U.S. 91, 99 (1955)(observing that "'[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right'"). In the instant case, Petitioners in one of the consolidated actions below initially asserted a claim under ERISA. However, neither in the briefing on the parties' cross-motions for summary judgment, nor in the briefing before the court of appeals did Petitioners aver that ERISA somehow relieved them from the terms of releases they signed or rendered those releases invalid. Rather, Petitioners' argument is a wholly new one that the Court should reject as dilatory.[33]

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[33] Even if considered on the merits, this claim is baseless. Respondents did not act arbitrarily and capriciously (and thus did not violate ERISA) by providing different benefits to those employees who chose, knowingly and voluntarily, to accept the enhanced severance benefits in exchange for signing a release and those who chose to decline the offer. *Harlan v. Sohio Petroleum Co.*, 677 F. Supp. 1021, 1026-27 (N.D. Cal. 1988)(holding that employer who "created and offered . . . [a severance plan] for certain employees who were terminated," which was conditioned on signing a release, did not violate ERISA).

CONCLUSION

For the aforementioned reasons, the Court should DENY the petition for certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-20358

BARBARA NORTON, ET AL.,

PLAINTIFFS - APPELLANTS,

VS.

HOUSTON INDUSTRIES INCORPORATED, et al.

DEFENDANTS - APPELLEES.

Before WISDOM, REYNALDO GARZA and GARWOOD, Circuit Judges.[1]

PER CURIAM:

Having considered the briefs and arguments of counsel and the relevant portions of the record, this Court is convinced that the district court's judgment is correct, essentially

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expenses on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

for the reasons given by the district court. Defendants' summary judgment evidence showed that the releases were valid and in accordance with the law, and plaintiffs produced no summary judgment evidence to support a contrary finding. The record refutes the contention that plaintiffs were not allowed forty-five days in which to consider the releases before signing them. Under *Delaware State College v. Ricks*, 101 S.Ct. 498, 504 (1980) plaintiffs' argument that they were releasing claims arising after the date of the releases is without merit. Plaintiffs' conclusory affidavits did not suffice to raise fact issues. *See Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). Moreover, plaintiffs failed to tender back any of the consideration received for the releases. *See Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991); *Wamsley v. Champlin Ref. & Chem, Inc.*, 11 F.3d 534 (5th Cir. 1993); *Wittorf v. Shell Oil Co.*, 37 F.3d 1151, 1154 (5th Cir. 1994).

Under all the circumstances, we find no abuse of the district court's discretion in its denial of plaintiffs' motion for leave to amend, which was filed after the defendants' motion for summary judgment. The judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BARBARA NORTON, ET AL	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	**CIVIL ACTION**
	§	**NO. H-92-3239**
HOUSTON INDUSTRIES	§	
INCORPORATED, ET AL.,	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending before the Court are the plaintiffs' motions for class certification, to dismiss, for judgment on the pleadings, and for summary judgment (instrument #49). Also pending are the defendants' cross-motion for summary judgment, (instrument #59, #60), an additional cross-motion by the plaintiffs (instrument #64); and the parties' responses, supplemental responses, replies and surreplies (instruments #58, #60, #64, #65, #67, #69) to each of the other's motions. The plaintiffs have also moved to file a supplemental complaint, which the defendants opposes (instruments #62, #70).

The plaintiffs brought claims in four separate lawsuits. In *Anzaldua, et. al. v. McKinsey & Co., et. al.*, No. 93-0400, the plaintiffs assert state law claims. That suit was removed from state court to the Federal Court. In *Fuentez, et. al. v.*

Houston Indus., Inc. et. al., No. 92-2728, the plaintiffs claim a violation of the Worker Adjustment and Retraining Notification Act and in *Pace, et. al. v. Houston Indus., Inc., et. al.*, No. 93-0430, the plaintiffs asserted claims under the Employee Retirement Income Security Act and Age Discrimination in Employment Act.

In the interest of judicial economy, the Court has consolidated these cases for the purpose of determining the issue of the effect the signing of releases by various employees has, if any, on the causes of action asserted in the various lawsuits. Except for Cause No. H-92-2728, the cases are otherwise consolidated into this case for all purposes.

FACTUAL BACKGROUND

Houston Lighting and Power Company ("HL&P") and Utility Fuels, Inc. ("UFI"), wholly owned subsidiaries of Houston Industries, Incorporated ("HII"), terminated approximately 1100 employees in June of 1992. The plaintiffs are some of the terminated employees. HII administers the companies employee retirement plan and is therefore, a party to this litigation.

In January of 1992, prior to an April notification of termination, HL&P issued a one-page announcement stating the following:

> Under the severance plan, the Company will provide separated employees compensation equal to 3 weeks of salary per year of service with a minimum of 12 weeks pay and a 52 week maximum. The first 60 days, separated employees will continue to be paid and receive benefits as if they were still employed. Then, they will receive a lump sum payment for the balance.

On or before April 5, HL&P supervisors notified 960 employees of their severance and gave each a severance package. The package contained a letter from HL&P stating that full salary and benefits would continue for 60 days, and that the

employees could participate in a severance plan if they timely executed a release waiving claims against the company. The letter further informed employees that they would receive the release and pay plan by mail during the week of April 13. The package also contained a 27-page Success Through Excellence in Performance brochure, describing severance benefits.

As announced, during the week of April 13, HL&P mailed each targeted employee the pay plan package. A letter from the company president accompanying the package stated in bold face type in relevant part:

> **To accept the severance Pay Plan Offer, you must sign the enclosed Agreement and Release and return it to HL&P Employee Benefits...within 45 days of receipt of this package. You may revoke your Agreement and Release within 7 days after signing it, but if you revoke it, you will lose your rights to Severance Pay Plan benefits.**

Concurrently, UFI targeted 49 individuals for severance and they were provided a similar, if not identical severance benefits package. The package contained a severance benefits brochure and a letter similar to that supplied to the HL&P employees.

Most, but not all of the HL&P and UFI targeted employees signed the "Agreement and Release". The release, which allows seven days for revocation states, in part:

> In exchange for the Company's payment to me of the severance benefits, I agree not to sue, and I waive all claims and release the Company -- from liability and damages related in any way to my employment with or separation from the Company or its affiliates. This waiver and release includes, but is not limited to, claims and causes of action under Title VII of the Civil Rights Act of 1964, as

> amended; the Civil Rights Act of 1991; the Age Discrimination in Employment Act of 1967, as amended, the Civil Rights Act of 1866, the Texas Commission on Human Rights Act; the Americans with Disabilities Act; the Older Workers Benefit Protection Act of 1990; the Employee Retirement Income Security Act of 1974, as amended (except as it relates to employee benefit plans qualified under Section 401(a) of the Internal Revenue Code of 1986); the Worker Adjustment and Retraining Notification Act; all state and federal statutes and regulations; all oral or written contract rights; and the common law, such as tort or personal injury of any sort.

The 60-days pay benefit that had been announced in January was mentioned in the severance benefit brochures and states:

> During the 60-day severance notification period, you will receive your regular pay and benefits. As soon as possible after the end your severance notification period, you will receive a severance pay benefit in a lump sum cash payment, provided the Company receives your signed Agreement and Release within the required 45 days and you do not revoke it during the 7-day notification period.

The calculation for the additional lump sum payment beyond the 60-days pay was also contained in the brochures and plans. In essence, an employee would receive a minimum of four weeks pay for one year of service up to a maximum of 44 weeks pay for 18 years or more of service. All severed individuals received the 60-days pay benefit whether they signed a release or not.

PLAINTIFF'S CONTENTIONS

The plaintiffs allege that the defendants concocted a scheme to cut costs and medical benefits by laying off older employees, employees who were injured or had ill family members, and others perceived as troublemakers. In addition, the plaintiffs claim that the 60-days pay benefit is in addition to the 60-days full salary and benefits, that is paid to all severed employees. The plaintiffs assert that the defendants deducted the additional 60-days benefit before paying the lump sum benefit, thus, violating a term of the severance package.

In their motion for summary judgment, the plaintiffs list eight reasons that the "Agreement and Release" is not valid. They state that the release: (1) does not contain an offer; (2) fails to specify the amount of consideration; (3) is not signed by the party to be charged; (4) is indefinite because (a) the amount of consideration is not specified, (b) it is not signed by the defendants, and (c) essential terms are not within the four corners; (5) is invalid because the defendants failed to explain the terms of offer, and the terms, conditions, method and manner of acceptance; (6) is ambiguous and should be construed against the drafter; (7) violates the parol evidence rule by referring to other documents and by containing indefinite essential terms; and (8) is unconscionable because of disparity in bargaining power.

In addition to the argument that the release is invalid, the plaintiffs argue that the release does not waive an ADA action because to do so violates the Old Worker's Benefit Protection Act ("OWBPA"). The plaintiffs assert that the release attempts to waive rights arising after its execution, because the plaintiffs' action relates to the termination of the employment relationship on June 5, 1992. The plaintiffs also argue that the release violates the OWBPA because the employees did not have the required 45 days to consider it before signing.

The defendants respond that the employees' rights accrued when they were notified on or about April 6, 1992, of their June 5th termination date. The defendants also contend that

the release is definite. They assert that it contains an identifiable offer, states its intent, does not need to state a precise dollar amount, and may refer to other documents. The defendants also argue that their signature is not required to establish a contract and that they had no duty to explain the terms of the offer to the employees. The defendants maintain that any disparity in bargaining power does not mean that the release is unconscionable. Moreover, they argue, by signing the release the plaintiffs ratified it.

In the defendants' cross-motion for summary judgment, the defendants contend that the plaintiffs knowingly and voluntarily waived their federal law claims under the "totality of the circumstances" test because: (1) the release is simple and comprehensible in light of the plaintiffs' education and business experience; (2) the plaintiffs had ample time--at least forty-five days to consider the release; (3) the plaintiffs were similarly treated because individual treatment was impractical and the plaintiffs exclusion from deciding the terms of the release is not dispositive; (4) the release was written simple and clear; (5) the release advised the plaintiffs to consult with an attorney; and (6) the plaintiffs received additional consideration beyond that which they were entitled for agreeing to the release.

Finally, the plaintiffs seek to dismiss the defendants' counterclaim and affirmative defense of waiver and release under Fed.R.Civ.Proc. 12(b)(6) and alternatively for judgment on the pleadings under Fed.R.Civ.Proc. 12(c).

The plaintiffs requested certification as a class action, and because some of the plaintiffs belong to bargaining units represented by the Union and have filed grievances to determine if the company's termination procedure violated the collective bargaining agreement, the Union was sued. The Union seeks summary judgment contending that the validity of the release should be determined by an arbitrator in the individual employee grievance procedures. Alternatively, and if the release is held to valid and enforceable, the claims of the employees against the Union should be dismissed as moot.

AUTHORITIES AND DISCUSSION

Federal Rule of Civil Procedure 56(c) provides that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) In determining whether the movant has met this burden, the Court should consider the evidence and the inferences in the light most favorable to the nonmovant. *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982).

Despite the parties' numerous filings and contentions, the issues are simple and require the Court to determine the validity and enforceability of the releases. These issues will be addressed in turn.

I. VALIDITY

In the Court's opinion, the plaintiffs' several arguments that the release is not valid, fail. First, the release contains an offer. Its first sentence states, "In its offer letter to me, [the Company] offered to pay me . . . " The second sentence states, "I choose to accept this offer." Thus, the lack of offer argument is unmeritorious.

The plaintiffs next argue lack of consideration. There is consideration. The release refers to the consideration as "the severance benefits as described in the HII Severance Pay Plan, as effective March 30, 1992 through June 30, 1992." Texas law does not require that the specific dollar amount be stated. See *Penwell v. Barrett*, 724 S.W.2d 902, 905 (Tex. App.--San Antonio 1987, no writ). It is not a mystery, though, what each employee will receive. Nevertheless, the contract required the plaintiffs to forego legal claims in exchange for the severance package.

The plaintiffs also argue that the defendants did not sign the contracts. This is a false issue because only the party charged with accepting the offer must sign to effectuate the contract. See *Clegg v. Brannan*, 234 S.W. 1076 (Tex. 1921). In the Court's opinion, the absence of the defendants' signature is of no consequence in determining the issue of validity.

The plaintiffs argue as well that the release is not definite. The plaintiffs are also incorrect on the point. The release specifically refers to the letter describing the HII Severance Pay Plan. The terms of the letter are incorporated or subsumed by the agreement. See *MTrust Corp. N.A. v. LJH Corp.*, 837 S.W.2d 250 (Tex. App.--Fort Worth 1992, writ denied).

As a fifth argument, the plaintiffs assert that the defendants had a duty to explain the term of the offer, or the terms, conditions, and method of acceptance. The release states, "I choose to accept this offer," "I understand that signing this Agreement and Release is an important legal act", and "I acknowledge that the Company has advised me to consult an attorney before signing this Agreement and Release." The release provided a line for a signature and a date signifying acceptance. This is enough.

The plaintiffs' argument that ambiguities should be construed against the defendants is irrelevant. First, the plaintiffs do not state what ambiguities exist. Nevertheless, in this Court's opinion, the release is unambiguous as a matter of law. See *Derr Constr. Co. v. City of Houston*, 846 S.W.2d 854, 862 (Tex. App.--Houston [14th Dist.] 1992, no writ).

The plaintiffs next argue that the parol evidence rule is violated by reference to other documents. The other document referred to is the letter from HII, wherein the defendants offered to pay severance benefits as described in the HII Severance Pay Plan. Under the doctrine of incorporation by reference, the letter and the pay plan became part of the release agreement when the release was signed by the plaintiffs. *MTrust Corp.*, 837 S.W.2d at 253-54.

Finally, the plaintiffs argue that the disparity in bargaining power make the release unconscionable. See *Southwestern Bell Tel. Co. v. Delanney*, 809 S.W.2d 493, 498 (Tex. 1991) (J. Gonzalez, concurring). Unconscionability raises an issue of enforceability, not validity. Therefore, even though the release terms were non-negotiable, the plaintiffs were not forced to accept its terms. To the contrary, the plaintiffs knew what they were getting--severance benefits in exchange for release of any claims against the defendants. The Court finds that the release is not rendered invalid based on unconscionability.

Having determined the issue of validity, the Court now turns to the issue of enforceability.

II. ENFORCEABILITY

Federal Law Claims:

In the Court's opinion, a release is enforceable where the parties agree to its terms knowingly and voluntarily. The factors determining a knowing and voluntary waiver depend on the type of claim to be waived. The plaintiffs have alleged various federal and state law claims and the Court shall address each.

The plaintiffs incorrectly argue that ordinary contract principles govern the enforceability of a release involving ADA claims. The Fifth Circuit has utilized "totality of the circumstances" test in determining whether a waiver was made knowingly and voluntarily. *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990). Those factors are:

> (1) The plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the agreement before signing it; (3) the role of the plaintiff in deciding the terms of the agreement; (4) the clarity of the agreement; (5) whether the plaintiff was represented by or consulted with an attorney; and

> (6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract of law.

O'Hare, 898 F.2d at 1017. After the "totality of the circumstances" test was pronounced, the Older Worker's Benefit Protection Act amended the ADA and prescribes minimum requirements for a waiver. In the Court's opinion, the totality of the circumstances test is subsumed by the more stringent requirements of the OWPBA. Therefore, if the release satisfies the OWBPA, it satisfies the ADA totality of the circumstances test. The OWBPA states:

* * *

(f) Waiver

> (1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum --

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual is already entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

F) (i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement.

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired.

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

29 U.S.C.A. § 626(f) (West Supp. 1993).

The plaintiffs contend that the release violates subsection (f)(1)(C) by attempting to cause the plaintiffs to waive claims arising after the termination of their employee relationship on June 5, 1992. The undisputed evidence shows that the employees were notified by April 6 that their employment relationship would terminate on June 5 and that the releases were signed between April 14 and May 30. In the Court's opinion, the release does not attempt to waive any claims that might arise after the execution date. As the defendants assert, any cause of action relating to the employees' discharge arose when the employee were notified of the discharge on April 6, 1992, not the termination date June 5, 1992. See *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981). However, at the latest, the causes of action, if any, arose seven days after the releases were signed. Specifically, the causes of action asserted here arose within the term of the employment.

The plaintiffs also argue that subsection (f)(1)(F)(ii) was violated because, whether the defendants allowed the employees 45 days to consider the release is a fact issue. The plaintiffs assert that the defendants sent the release amidst stacks of other documents, spread rumors that benefits would be lost if not signed immediately, and told them that the tax consequences were grave if the release was not signed by April 15. The plaintiffs also argue that the 45-day period should have been a term contained within the release document.

Subsection (f)(1)(F)(ii) requires that an individual be given "at least 45 days *within which* to consider the agreement." (emphasis added). Both the UFI and HL&P employees received a letter and a release information sheet stating in conspicuous

boldface type, that the release must be accepted and returned within 45 days to be effective. The UFI employees received the letter and information sheet when they were notified of their severance and the HL&P employees received the notice by mail on or about April 13. The latest date that an individual returned a release was May 30. In the Court's opinion the plaintiffs not only received the required notice but also had the required time within which to consider the release before the operative time wall, June 5.

The plaintiffs next contend that fact issues exist as to: (a) the plaintiffs' role in deciding the release's terms; (b) the release's clarity; (c) the plaintiffs' education and business experience, and whether the plaintiffs' consulted with an attorney prior to signing the release. These arguments fail to raise any fact issues. Although the plaintiffs played no role in deciding the terms of the severance plan; they, nevertheless, knew that they had a choice to participating or not. They also knew that by signing the release, they were waiving numerous causes of action.

On the question of clarity, the release is a one-page document, printed in normal size type, and conspicuously entitled "Agreement and Release." It states several times throughout that the employee is waiving claims against the defendants for both liability and damages. The release lists specific statutory laws that are waived, both state and federal statutes and regulations and common law contract and tort claims. The release refers to the HII Severance Pay Plan and outlines the benefits to be received if a release is timely executed. Finally, the pay plan presents the terms of the severance benefits in an organized fashion. Both severance brochures state in boldface type that, if there is any conflict in terms, the HII Severance Pay Plan governs. Clarity is not an issue here.

Despite the plaintiffs' contention that the defendants have not produced any evidence of their education and business experience, the Court finds that the release is written in a manner to be understood by the average individual eligible to participate in the severance benefit plan, as required by subsection

(f)(1)(A). Assuming that any individual could not understand the particularities of the release, the document's language places such emphasis on the release that an individual cannot in good faith say that adequate notice was not provided. The Court finds that the plaintiffs did not blindly sign the release. Moreover, the release states that it is an "important legal act" and advises the plaintiffs to consult an attorney before signing.

Therefore, the Court finds that the defendants complied with the OWBPA, and that the release waives the plaintiffs' ADA claims as well as the remainder of the plaintiffs' federal law claims.

State Law Claims:

The plaintiffs' state law claims are for breach of contract, fraud, misrepresentation, conversion, and intentional infliction of emotional distress. Under Texas law, a release is treated like a contract. See *Williams v. Gash*, 789 S.W.2d 261, 264 (Tex. 1990). As discussed previously, a release is a valid enforceable contract and may waive various state law claims. However, a release is subject to defenses just as any other contract. *Williams*, 789 S.W.2d at 264. The plaintiffs' petition raises the defenses of fraud and misrepresentation.

Under state and federal law, fraud is a defense that must be plead with particularity. See *Tobbon v. State Farm Mut. Auto Ins. Co.*, 616 S.W.2d 243, 245 (Tex. Civ. App.--San Antonio 1981, 1981, writ ref'd, n.r.e.). The charging party has the burden of proving that a material misrepresentation was made, that is false when made, or made with reckless disregard for the truth, and as a positive assertion, made with the intention that it be acted upon, is relied upon, and injury is suffered. *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 185 (Tex. 1977).

In their original petition, the plaintiffs contend that the defendants made "numerous misrepresentations and fraudulent inducements surrounding the plaintiffs' lay-off. These misrepresentations as alleged, included statements that the

defendants were losing money and that downsizing was necessary when in fact the Company actually made gains. The petition alleges that the defendants "developed a fraudulent scheme" to circumvent the employee evaluation system, and that supervisors "arbitrarily and capriciously" assigned employees points, thus, manipulating the employee's assessment. The plaintiffs also claim that the defendants hired other persons for the same positions for which the layoffs occurred. Finally, the plaintiffs assert that the defendants through fraud and deceit, willfully refused to comply with federal law; i.e. to give a 60-day notice that the employee would be laid off, and represented that they would receive a 60-day pay benefit in addition to three weeks for each year of service.

Taking the plaintiffs' allegations as true, the representations fail to state a cause of action that has any nexus to the claims arising out of the signing of the releases. Whether it is true that the defendants did not need to reduce the work force, arbitrarily ranked employees for dismissal, hired other persons to replace them, or did not give a proper 60-day notice, no relevance is attached concerning the offer and its terms. Moreover, the representations that the defendants made relevant to inducing the plaintiffs to sign the release, were not false. The defendants' January announcement stated that a severed employee was to receive

> ---compensation equal to 3 weeks of salary per year of service with a minimum of 12 weeks pay and a 52 week maximum. The first 60 days, separated employees will continue to be paid and receive benefits as if they were still employed. Then, they will receive a lump sum payment for the balance.

All severed employees received the 60 days continuous pay irrespective of the lump sum pay that was tied to the release. The fact that the 60-day pay benefit is not included in the HII Severance Pay Plan is unimportant because the pay period began April 1, 1992. The HII severance pay plan applied to all

targeted employees while the lump sum pay plan applied only to targeted participating employees.

While it may be argued that the announcement misrepresents how the benefits were to be distributed, no severed employee suffered injury because each received the promised benefits. The participating individuals received a lump sum payment of at least four weeks pay in addition to the 60 days continuous pay.

The plaintiffs contend, however, that the 60-days pay was deducted from the lump sum benefit. This is not so. According to the pay plan, the plaintiffs who signed releases would received the 60-days pay between the notification and the termination date, and also received a lump sum benefit of at least four weeks pay. This procedure, if followed, is in compliance with the contract.

The plaintiffs have moved to supplement their complaint to add defenses of economic duress. estoppel, unconscionability, and in the alternative, mutual mistake.[1] In their motion, the plaintiffs do not allege any supporting facts, but merely list the causes in a single paragraph. The plaintiffs also have cross-moved for summary judgment on these claims, albeit prematurely. Because these claims arise out of the same nucleus of facts as the plaintiffs' other claims and raise no causes of action not covered by the release, the Court denies the motion to amend.

The plaintiffs have sought class certification. This request is moot because the plaintiffs who did not sign the releases and the plaintiffs who revoked the release agreement within the seven-day period, have not waived their causes of actions against the defendants. Each may amend their causes of action in this cause or in Cause number H-92-2728. These parties have 30 days from the entry of this Order to amend their pleadings, accordingly.

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[1]The proposed supplemental complaint also added a cause of action for negligence. This action would be moot if leave were granted because it is also waived by the release.

cause or in Cause number H-92-2728. These parties have 30 days from the entry of this Order to amend their pleadings, accordingly.

The Court DENIES the plaintiffs' motions for summary judgment, dismissal, for judgment on the pleadings, and for cross-summary judgment. The Court GRANTS the defendants' motion for summary judgment. The Union's motion to dismiss is Granted. The remaining plaintiffs are ORDERED to amend their pleadings within 30 days and plead any causes of action that remains either in this cause or cause number H-92-2728.

Finally, Cause Number H-92-2728, is returned to Judge Melinda Harmon's docket. Cause Number 93-0430 and 93-0400 are administratively closed, the claims and parties in those suits having been merged in this cause.

Any motion not addressed in this order is Denied.

It is so ORDERED.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES DISTRICT JUDGE

APPENDIX C

Dear Employee:

I regret to inform you of your permanent separation from employment with Utility Fuels, Inc. Your salary and benefits will continue for 60 days; however, you will no longer report to work effective immediately. No bumping rights exist.

To assist you in the separation, the Company is offering you the opportunity to participate in a voluntary program offered by Houston Industries Incorporated. The program provides cash and other benefits to you, which are described in the enclosed brochure. Participation is limited to employees who timely execute an Agreement and Release which waives all claims and releases the Company, its affiliates, the employee benefit plans, their directors and officers, employees, fiduciaries and agents from liability and damages in any way related to your employment with or separation from the Company or any of its affiliates. The Company will pay you a lump sum severance pay benefit, enhanced welfare benefits and a 65-Point pension (if eligible), provided you sign the Agreement and Release.

The severance benefits have been determined in accordance with the Houston Industries Incorporated Severance Pay Plan, as effective March 30, 1992 through June 30, 1992 (a copy of which is enclosed). All benefits under this Plan are voluntary and unconditional on the part of the Company and are not required by any legal obligation other than the Plan itself. Information about the severance pay benefit and the other benefits to which you may be entitled are given in the material enclosed in this packet. You are encouraged to read all the material thoroughly and carefully.

In approximately two weeks you will receive a personalized packet with specific information about the benefits you will receive if you accept the Severance Pay Plan offer. The packet will be sent to the mailing address that you have on file with the Company. If you have questions, you may call Employee Benefits (229-7373 or

7374 in the Houston area and 1-800-932-7444 outside the Houston area).

To accept the Severance Pay Plan offer, you must sign the enclosed Agreement and Release and return it to UFI Human Resources, P.O. Box 539, Houston, TX 77701, within 45 days of receipt of this package. You may revoke your Agreement and Release within 7 days after signing it, but if you revoke it, you will lose your rights to Severance Pay Plan benefits.

If you need further information, call Gilbert Elizondo at 713-888-4616.

Sincerely,

Don D. Sykora, Chairman
Compensation & Benefits Committee

P.O. Box 4567, Houston, Texas 77210 (713) 629-3000

APPENDIX D

HOUSTON INDUSTRIES INCORPORATED
SEVERANCE PAY PLAN
(March 30, 1992-June 30, 1992)

AGREEMENT AND RELEASE INFORMATION

The Severance Pay Plan (the "Plan") is offered by Houston Industries Incorporated (the "Company") to employees of the Company, Houston Lighting & Power Company and Utility Fuels, Inc. who are notified of involuntary termination between March 30, 1992 and June 30, 1992. The Plan provides severance benefits (as described in the enclosed plan document) **only** if you sign an Agreement and Release within 45 days from the receipt of this offer.

Severance benefits are voluntary and unconditional on the part of the Company and are not required by any legal obligation other than the documents underlying the Severance Pay Plan itself. All persons within the description contained in the foregoing paragraph are eligible for the Plan, regardless of job title, job classification, or organizational unit. The attached lists specify the positions eliminated and those retained (detailed by job titles and ages).

Whether or not you accept this offer is entirely your choice. In any event, you will receive 60 days' salary and benefits and will be eligible for COBRA (18-month) extension of medical and dental coverage, and any benefits you are otherwise entitled to under the Retirement Plan for Employees of Houston Industries Incorporated and the Savings Plan of Houston Industries Incorporated.

You may accept this offer only by signing the attached Agreement and Release which waives your seniority rights and all claims, and releases the Company, its affiliates, the employee benefit plans, their directors and officers, employees, fiduciaries and agents from liability and damages related in any way to your employment with or separation from the Company and its affiliates. By signing the attached Agreement and Release, you agree to return immediately,

and to maintain in strictest confidence and not to use in any way, any proprietary, confidential, or other nonpublic information or documents relating to the business or affairs of the Company and its affiliates.

Your decision to waive these claims and rights is an important legal act, and you should consult with an attorney before executing this Agreement and Release.

If you choose to accept this offer, your Agreement and Release must be signed within 45 days from your receipt of these Plan materials and returned to UFI Human Resources, P.O. Box 539, Houston, TX 77001.

If you choose to accept the severance benefits by signing, dating and returning the enclosed Agreement and Release, you have an additional seven days after you sing and date it during which you may change your mind and revoke the Agreement and Release by delivering a written statement to the Compensation and Benefits Committee, Attn: Secretary, P.O. Box 61867, Houston, TX 77208.

APPENDIX E

AGREEMENT AND RELEASE

In its offer letter to me, Houston Industries Incorporated (the "Company") offered to pay me the severance benefits as described in the Houston Industries Incorporated Severance Pay Plan, as effective March 30, 1992 through June 30, 1992, to waive seniority rights and claims, and release the Company, its affiliates, its employee benefit plans, their directors and officers, fiduciaries, employees, and agents from liability and damages related to my employment or separation from the Company or its affiliates. I choose to accept this offer.

I understand that signing this Agreement and Release is an important legal act. I acknowledge that I have received and had an opportunity to review the lists of positions eliminated and those retained (as detailed by job title and age). I acknowledge that the Company has advise me to consult an attorney before signing this Agreement and Release.

In exchange for the Company's payments to me of the severance benefits, I agree not to sue, and I waive all claims and release the Company, its affiliates, its employee benefit plans, their directors and officers, fiduciaries, employees and agents from liability and damages related in any way to my employment with or separation from the Company or its affiliates. This waiver and release includes, but is not limited to, claims and causes of action under Title VII of the Civil Rights Act of 1964, as amended; the Civil Rights Act of 1991; the Age Discrimination in Employment act of 1967, as amended; the Civil Rights Act of 1866; the Texas Commission on Human Rights Act; the Americans with Disabilities Act; the Older Workers Benefit Protection Act of 1990; the Employee Retirement Income Security Act of 1974, as amended (except as it relates to employee benefit plans qualified under Section 401(a) of the Internal Revenue Code of 1986); the Worker Adjustment and Retraining Notification Act; all state and federal statutes and regulations; all oral or written contract rights; and the common law, such as tort or personal injury of any sort.

I also agree to return immediately, and to maintain in strictest confidence and not to use in any way, an proprietary, confidential, or other nonpublic information or documents relating to the business or affairs of the Company and its affiliates.

I understand that for a period of seven (7) days following the signing of this Agreement and Release, I may revoke my acceptance of the offer by delivering a written statement to the Compensation & Benefits Committee, Attn: Secretary, P.O. Box 61867, Houston, TX 77208 and the Agreement and Release will not become effective. In the event I revoke my acceptance of the offer, the Company shall have no obligation to provide me any rights or benefits under the Severance Pay Plan.

_____

Date Employee Signature

_____

Employee Name (Please Print)

_____

Employee Social Security Number